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IN THE
Supreme Court of the United States
October Term, 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND BRIEF *AMICUS CURIAE*

Respectfully submitted,

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The Chamber of Commerce of the United States of America respectfully moves for leave to file the attached brief *amicus curiae* on behalf of Appellants in the present case, pursuant to Rule 42 of the Rules of this Court. Counsel for Appellant has given consent for this filing.

1. The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of

commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. In order to represent its members' view on questions of importance to their vital interest and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* (and as a party) in a wide range of significant labor relations matters before this Court; *e.g.*, *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, 416 U.S. 115 (1974); *The Chamber of Commerce of the United States of America, Petitioner* v. *Robert Francis, et al., Respondent*, Petition for Writ of Certiorari pending; *Geduldig* v. *Aiello, et al.*, 417 U.S. 484 (1974); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

3. The underlying question presented in this case is whether a state may provide financial support to one of the parties to a labor dispute—the union—by granting public benefits to non-striking workers temporarily idled as a direct result of such a dispute. This case, then, is another in the growing list of decisions involving the issue of whether public funds may be provided to workers participating in or affected by a labor controversy.

The Chamber's concern about the manner in which this question will be resolved is evinced by its repeated participation in litigation presenting this issue. Thus, the Chamber has participated as *amicus curiae* before this Court in *Super Tire*,

supra, and as a party before various lower courts.[1] Indeed, the Chamber has been the only party who has consistently litigated the questions presented by this cause and is therefore uniquely able to contribute to their resolution.[2]

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[1] The Chamber was permitted to intervene and participate in the evidentiary hearing in *Hawaiian Telephone Company*, 378 F. Supp. 794 (D. Hawaii). The Chamber was permitted to intervene in *Grinnell Corp.* v. *Hackett*, 475 F.2d 499 (CA 1, 1973) *cert. den.* 414 U.S. 858 (1973); *Russo* v. *Kirby*, 453 F.2d 584 (CA 2, 1971); *U.S. Chamber of Commerce* v. *Francis* (CA 4 No. 74-1991); and, over opposition the Chamber has been permitted to participate as a party-plaintiff in pending proceedings in *Dow Chemical Co. and the Chamber of Commerce of the United States of America* v. *Taylor*, 57 F.R.D. 105 (E.D. Mich. Civil No. 38664).

[2] The Third Circuit in *Super Tire* observed that the Chamber, while not designated as a formal party, was the *real* party in interest whose presence indicated an ongoing interest in the issues raised in that litigation. *Super Tire* raised issues that are closely related to the issues presented in the instant case.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

SUMMARY OF THE ARGUMENT*

The State of Ohio has disqualified persons idled due to a labor dispute involving their employer. Those disqualified include not only striking employees, but also those non-striking

* The interest of the *amicus curiae* is set forth in the Motion filed with this brief.

employees laid off due to the dispute, when the dispute takes place at a location functionally integrated with the laid off employees' place of work.

The court below distinguished between these two groups of employees holding the Ohio law unconstitutional only as it applied to the latter.

It is here contended that the decision below is unsound, and that the denial of unemployment benefits to any employee idled because of a labor dispute involving his employer is consistent both with federal labor policy and with the purpose of the Social Security Act. The cornerstone of federal labor policy is the resolution of economic disputes by free collective bargaining. This policy mandates that the resolution of labor controversies depend upon the strength and tenacity of the bargaining parties, themselves. Thus, under the federal scheme of labor relations, each bargaining party recognizes that he will be required to endure the immediate and future consequences of a continued disagreement, a strike or a lockout, and that this cost to him may exceed the expense of compromise and agreement. Any economic hardship which employees may suffer as a result of maintaining their collective bargaining demands is an accepted and proper aspect of the confrontation of economic power. As long as the parties recognize that they alone must bear the risks attendant to intransigence or the utilization of economic force, the collective bargaining process will continue to produce the voluntary compromises that Congress intended.

It follows that federal labor policy interdicts state intrusion into the bargaining process when this intrusion unsettles the federally created balance of power and rights, and instead mandates strict state neutrality during a labor dispute. Thus, it is that federal labor policy proscribes public financial support—through state aid—during a labor dispute for one or the

other of the bargaining parties, since this support, by relieving an intractable party of the cost of a prolonged disagreement, will in effect forestall voluntary compromise.

Payment of unemployment benefits, whether to striking employees or to non-strikers idled because of a labor dispute involving their employer, violates the congressional mandate that states remain neutral in labor disputes. Where these benefits are paid by the state, the employer whose employees are idled due to this dispute must, as a general rule, restore the funds to the state. His financial burden may well be substantial whether strikers, non-striking employees idled due to the strike or both are granted benefits. It is this cost burden that occasions the employer to accept contract proposals disadvantageous to him in order to forestall or curtail a strike. The settlement reached, therefore, is not reflective of the strength of the employer, if these benefits were not available to his employees. Free collective bargaining as envisioned by federal labor policy has thus been undermined by the availability of these benefits.

Moreover, the denial of unemployment benefits to those idled due to a labor dispute involving their employer is consistent with and permitted by the federal social security law. While each state has been accorded considerable freedom to develop its own particular unemployment benefit program so that the plan that results will be best adapted to local conditions, the latitude permitted the states is not without limitation. Thus, states may not depart from those standards which Congress has deemed to be fundamental.

The Social Security Act was designed to provide essential income maintenance to persons who lost their employment due to a business depression or to fluctuations in trade. It is axiomatic that persons idled as a result of a labor dispute involving their employer are not unemployed due to these reasons. It follows that their ineligibility for unemployment benefits is consistent with and permitted by the federal social

security scheme. Indeed, it is submitted that their eligibility expands the remedial purposes of the Act beyond the perimeters intended by Congress. The fact that the Social Security Act does not expressly preclude benefit payments to persons idled due to a labor dispute does not compel a contrary conclusion. Since Congress has prescribed free collective bargaining, unfettered by state intrusion, to be the mechanism to resolve labor disputes, provision by a state of these benefits is impossible; their availability places employers at a bargaining disadvantage. Moreover, the terms of the Social Security Act, itself—forbidding *inter alia* the denial of benefits to persons who refuse employment as strike breakers—guard against the use of that Act to undercut labor at the bargaining table. It is reasonable to conclude that Congress also intended that the Act would not frustrate management's bargaining strength and rights.

ARGUMENT

A. THE DENIAL OF UNEMPLOYMENT BENEFITS TO EMPLOYEES IDLED DUE TO A LABOR DISPUTE INVOLVING THEIR EMPLOYER IS CONSISTENT WITH FEDERAL LABOR POLICY.

1. Congress Has Regulated Labor Relations and Has Determined to Allow the Balance of Bargaining Advantage to Be Set by Economic Power Realities, Unaided by State Subsidies.

Congress has regulated labor relations to the fullest extent of its constitutional powers under the Commerce Clause *NLRB* v. *Fainblatt*, 306 U.S. 601, 607-8 (1939). Section 1 of the National Labor Relations Act (29 U.S.C. § 141, *et seq.*) declares it "to be the policy of the United States to eliminate . . . substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . " This legislative purpose is to be accomplished by

protecting the right to bargain collectively rather than by compel[ing] agreements between employers and employees. [The Act] does not compel any agreement whatever." *NLRB* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 45 (1937).[1]

Consistent with the federal legislative purpose of fostering the collective bargaining process without compelling agreements between an employer and his employees, Congress structured a bargaining system leaving the negotiating parties to their respective resources if a confrontation of economic power developed. Thus, Congress in Section 13 of the National Labor Relations Act created the federal right to employees to strike, and thereby left it to the bargaining parties to use this and other legitimate economic weapons "to induce one party to come to the terms desired by the other." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 489 (1960).

This Court has repeatedly observed that "The Congressional policy manifest in the Act . . . is to allow the balance of bargaining advantage to be set by economic power realities." (*NLRB* v. *Burns*, 406 U.S. 272, 288 (1971)) and has stated that in addition to strikes, lockouts are a legitimate instrument of coercive power when they are utilized by an employer to pressure a union to modify its bargaining demands or to secure a favorable settlement. *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965).[2]

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[1] *(Continued)*

All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly process of collective bargaining." II Leg. Hist. of NLRA (G.P.O. 1935) p. 2394.

In 1947, Congress expressly included this legislative policy in the Act by amending Section 8(d) of the Act to read:

"[The duty to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession."

[2] This Court has also observed that the federal scheme of labor relations requires that a collective bargaining relationship involve a "brute contest of economic power." *NLRB* v. *Insurance Agents Union*, *supra*, at 489.

Congress and this Court have recognized that in certain circumstances labor organizations possess the necessary leverage to achieve their collective bargaining goals; in other situations the realities of economic power are to the contrary. It was not the concern of Congress to equalize or affirmatively structure or alter the relative bargaining power of labor and management on a national scale. " . . . the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse." *Porter* v. *NLRB*, 397 U.S. 99, 109 (1970).

The foregoing demonstrates that the cornerstone of federal labor policy is the resolution of economic disputes by free collective bargaining. This policy mandates that the resolution of labor controversies depend upon the strength and tenacity of the bargaining parties, themselves.[3] Thus, under the federal scheme of labor relations, each bargaining party recognizes that he will be required to endure the immediate and future consequences of a continued disagreement, a strike or a lockout, and that this cost to him may exceed the expense of compromise and agreement. The "right to bargain collectively does not entail any right to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 309 (1965). Any economic hardship which employees may suffer as a result of maintaining their collective bargaining demands is an accepted and proper aspect of the confrontation of economic power. As long as the parties recognize that they alone must bear the risks attendant to

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[3] Cox, *Labor Law Pre-emption Revisited*, 85 Harv. L. Rev. 1337, 1351-1359 (1972).

intransigence or the utilization of economic force, the collective bargaining process will continue to produce the voluntary compromises that Congress intended.[4]

It follows that federal labor policy interdicts state intrusion into the bargaining process when this intrusion unsettles the federally created balance of power and rights, and instead mandates strict state neutrality during a labor dispute. Thus, it is that federal labor policy proscribes public financial support—through state aid—during a labor dispute for one or the other of the bargaining parties, since this support, by relieving an intractable party of the cost of a prolonged disagreement, will in effect forestall voluntary compromise.[5]

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[4] The legislative history is replete with references to such congressional intent. Senator Taft stated:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make an unreasonable demand and get away with it.... If there is reasonable equality at the bargaining table, I believe there is much more hope for labor peace." I NLRB Legislative History of the Labor Management Relations Act at 1007 (1947).

As Mr. Justice Frankfurter stated:

> "[The NLRA] leaves the adjustment of industrial relations to the free play of economic forces (and) seeks to assure that the play of those forces be truly free." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 183 (1941).

[5] The comprehensive study of Thieblot and Cowin, *Welfare and Strikers: The Use of Public Funds to Support Strikers*, Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania Press (1972), similarly observed:

> "The overwhelming weight of opinions unearthed by our studies, including those of strikers, union officials, and management personnel, was that the payment of tax supported benefits to strikers, by greatly reducing the economic pressure on those strikers, substantially diminished the back pressures from union members to settle and thereby made strikes last longer. Moreover, it seemed clear in the case studies that strike settlements were made more costly as managements, realizing what was occurring, paid more dearly to end the dispute," at 218.

2. By Denying Unemployment Benefits to Employees Idled Due to a Labor Dispute Involving Their Employer, the State Has Manifested a Policy That is Consonant with Federal Labor Policy.

The State of Ohio has disqualified persons idled due to a labor dispute. Those disqualified include not only striking employees, but also those non-striking employees idled due to the dispute, when that dispute takes place at a location functionally integrated with the idled employees' place of work.

The court below distinguished between these two groups of employees holding the Ohio law unconstitutional only as it applied to the latter. Thus, the court below held that the application of this disqualification to deny benefits to individuals who were unemployed through no fault of their own and who did not participate in or *benefit from a labor dispute* involving another union and their employer violated the Constitution.

In reaching its conclusion, the court below observed that the labor dispute disqualification, if applied to employees who strike to support bargaining demands, would be Constitutional, since the grant of public benefits to those strikers would place their employer at an unfair disadvantage in negotiations with their union. The decision below apparently recognized that the payment of public benefits to strikers reduces economic pressure on them and accordingly diminishes their incentive to reach a fair settlement. Moreover, employers, aware of the availability of public benefits for strikers, are more likely to accept union demands that are unreasonable and economically unsound, because these employers realize that the union and its members—assisted by public funds—have little to lose by a long strike.

As will be discussed, the opinion below is analytically unsound since both strikers and non-strikers idled because of a labor dispute should be denied unemployment benefits if the

required state neutrality in labor disputes is to be maintained. However, as will also be discussed, there may be equitable reasons to support the distinction drawn below between strikers and those who do not stand to benefit from the labor dispute but are nonetheless idled because of it. The discussion of such equities should not, however, be taken as endorsing a distinction for purposes of receiving unemployment benefits between those persons who voluntarily strike and those who are involuntarily furloughed *due to a labor dispute*, such as locked out employees.

a. Striking Employees:

Were a state to provide unemployment benefits to striking employees, it would impermissibly intrude upon the federal policy of free collective bargaining, since this provision of benefits would frustrate the ability of employers to negotiate with reasonable equality at the bargaining table. Thus, for example, were Ohio to subsidize striking employees, those subsidies would reduce economic pressures on strikers and diminish the incentive of even weaker unions to seek reasonable compromises. Unions and their members, whose insufficient strength or resolve would encourage them to reach prompt settlements absent the availability of unemployment benefits for strikers, will instead be willing to maintain rigid bargaining stances, comfortable in the assurance that in the event of a strike, the strikers will be compensated by the state subsidies. Then, too, employers who, but for state aid to strikers, could secure favorable compromises, due to their resolve when compared to that of a union or its members, will likely quickly settle for contracts less advantageous to management, well aware that the availability of unemployment compensation to strikers will foster prolonged strikes with the employer bearing the brunt of the cost.[6] The settlements eventually obtained will not be

[6] These costs include not only losses due to retarded production during the strike, but also, in states such as Ohio, to increased state taxes to reflect unemployment benefits paid to his striking employees. *(Continued)*

reflective of the strength or tenacity of the employer or the union, themselves, as free collective bargaining envisions, since the union's power was artificially augmented by state funds.

b. Non-striking employees who are idled because of a labor dispute involving their employer:

Where unemployment benefits are granted to employees who, while not striking, nonetheless are idled due to a labor dispute involving their employer, the *bargaining disadvantage* to that employer is *identical* to that which occurs when these benefits are accorded to strikers. An employer's tax burden—since he must restore funds paid by the State—may well be substantial whether strikers, non-striking employees who are idled due to the strike or both are granted unemployment benefits. It is this cost burden that occasions an employer to accept disadvantageous bargaining settlements that do not represent the strength of the negotiating parties, themselves. For example, in *Abernathy* v. *Eastern Air Lines*, 259 N.C. 190,

[6] *(Continued)*
As stated in the Jurisdictional Statement of the Ohio Bureau of Employment Services at p. 18, Ohio's system of Unemployment Compensation, unlike other forms of social legislation,

> "is not funded from the General Revenue nor does it depend upon employee contributions; rather, it is funded *in toto* by the *employer*. The amount that each employer must annually contribute is calculated based upon his experience rating. The experience rating refers to the relationship existing between the positive or negative balance in an employer's account with the state, compared to the number and amount of the charges against it when viewed over a period of time as set by state statute.
>
> "When there are charges against an employer's account because of the payment of unemployment benefits to his employees, the balance in the employer's account necessarily decreases. When this balance drops below a certain sum, the employer's tax rate for the next ensuring year is increased to offset the deficit."

In short, funds paid to striking employees and charged to their employer's account must be replaced by the struck employer.

130 S.E.2d 292 (1963) *cert. denied* 375 U.S. 161 (1963) a relatively small number of the airlines flight engineers struck because of a labor dispute. As a result of this dispute, thousands of Eastern's employees were idled. If these thousands were to be accorded unemployment compensation and charged against Eastern, the tax increase hanging over that employer would likely be of such magnitude that Eastern would promptly reach a settlement with the union to curtail the strike; a settlement that undoubtedly would not reflect the tenacity of the employer or the union were benefits not paid. The compromise reached would not, therefore, be the product of free collective bargaining and federal labor policy would be undermined.

The foregoing demonstrates that payment of unemployment benefits, whether to striking employees or to non-strikers idled because of a labor dispute involving their employer, violates the congressional mandate that states remain neutral in labor disputes. It is therefore apparent that to foster this congressional design and to wholly refrain from intruding upon federal labor policy, the State of Ohio has enacted the labor dispute provision at issue here. By maintaining this provision Ohio has manifested the strict neutrality in labor disputes as enjoined by Congress.

However, there may exist equitable grounds that support distinguishing, for the purposes of receiving unemployment benefits, between striking employees on the one hand and on the other hand, non-strikers who do not stand to benefit from the strike but who are idled as a result of it. When striking employees are granted unemployment benefits, there is exerted an impermissible double-barrelled impact upon the process of free collective bargaining. (1) Striking employees, encouraged by the payments, maintain rigid bargaining stances, engage in protracted strikes due to the cushioning effect of unemployment benefits, will likely obtain economically advantageous contract settlements—settlements that do not represent their own

bargaining power and that could not be achieved without the backing of state unemployment funds. (2) The known availability of these funds—likely supported solely by employer contributions—will pressure employers to accept economically disadvantageous settlements in order to forestall the huge costs of strikes—costs that include replacing the benefits paid by the State to striking employees. Again, the contract reached will not likely reflect the bargaining strength of the employer, were state aid not granted to strikers.

When non-striking employees who are idled because of a strike but who are not involved in it are granted unemployment benefits, only the second of the two effects just discussed occurs. That is, the idled non-strikers may not stand to gain from the labor dispute and are not direct participants in it. It may be that in this limited situation equities exist to treat these non-strikers differently than strikers and to permit states to grant these non-strikers unemployment benefits.[7]

This is not to suggest that there is a valid basis to distinguish, as did the decision below, between persons who strike and those who are involuntarily idled as a result of a labor dispute. The basis, if any in fact exists, for a distinction between strikers and others idled due to a labor dispute, is whether these others are participants in the labor dispute or stand to gain from it. Thus, employees locked out during bargaining because, for example, of bargaining positions they advanced or because they threaten to strike are, like strikers, direct participants in the labor dispute and stand to gain from it. These individuals—like striking employees—should not be granted unemployment benefits if the states' neutrality posture in labor disputes is to be maintained. To permit locked out

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[7] In some situations where historically an employer's employees are accorded substantially similar working conditions, though represented by different unions or employed in different facilities, these laid-off employees may well gain from a strike by others. In these circumstances benefits should be denied.

employees to receive unemployment benefits would be tantamount to foreclosing the use of this legitimate bargaining weapon. Employers will have little incentive to lockout if they must replace funds paid by the state to their locked out employees. The contract settlement reached without the lockout will likely be less advantageous to the employer than that which he could have achieved following a lockout. Just as in a situation where strikers receive unemployment benefits, the settlement will not reflect the strength and resolve of the employer or the union, due to the intrusion of the state —through state aid—into the bargaining process.

B. THE DENIAL OF UNEMPLOYMENT BENEFITS TO EMPLOYEES IDLED DUE TO A LABOR DISPUTE INVOLVING THEIR EMPLOYER IS CONSISTENT WITH AND PERMITTED BY FEDERAL SOCIAL SECURITY LAW.

Pursuant to the federal-state system for unemployment insurance benefits, each state has been accorded considerable freedom to develop its own particular program so that the plan that results will be best adapted to local conditions.[8] However, the latitude permitted the states is not without limitations. Thus, this Court has observed that "what [the states] may not do. . . . is to depart from those standards which in the judgment of Congress are to be ranked as fundamental." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 594 (1937). It is necessary, then, to examine the purposes underpinning the Social Security Act to determine if the State's disqualifications in this case are to be permitted.

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[8] H.R. Doc. No. 81, 74th Cong., 1st Sess. VI (1935). 115 Cong. Rec. 34106 (1969). Preface to the "Comparison of State Unemployment Insurance Laws," U.S. Department of Labor (1972) at page iii:

> "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditiors prevailing within the state. Consequently, no two State laws are alike."

As this Court has recognized, the Social Security Act was designed to provide essential income maintenance to the unprecedented number of persons who lost their employment due to the Great Depression: "The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve." *Steward Machine Co.* v. *Davis, Supra,* at 586.

It is axiomatic that persons idled as a result of a labor dispute involving their employer are not unemployed due to a business depression or to fluctuations in trade.[9] It follows that their ineligibility for unemployment benefits is consistent with and permitted by the federal social security scheme. Indeed, it is submitted that their eligibility expands the remedial purposes of the Act beyond the perimeters intended by Congress.

While Congress did not expressly preclude benefit eligibility for persons idled due to a labor dispute, this omission cannot be construed as Congressional approval for payment to these persons. In the *first place,* the question is not whether Congress indicated an express determination to preclude the use of unemployment compensation for thee employees. Instead, the issue is whether Congress considered and created a

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[9] It is significant that Congress considered strikers to be employees under the Labor Act by expressly preserving in Section 2(3) the employer-employee status during the cessation of work caused by a labor dispute. As this Court has stated:

> "The status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment' (29 U.S.C. § 152(3))."

NLRB v. *Fleetwood Trailer Co.,* 389 U.S. 375, 381 (1967). Accord: *NLRB* v. *Mackay Radio and Tel. Co.,* 304 U.S. 333, 345 (1938), rev'g 87 F.2d 611, 92 F.2d 761 (9th Cir. 1973). *NLRB* v. *Carlisle Lumber Co.,* 94 F.2d 138, 144 (9th Cir. 1973). Thus, persons who ceased work in support of a strike were not considered by Congress to have terminated their contract of employment, and accordingly are not "unemployed."

framework, through collective bargaining, by which employers and unions were to resolve their economic disputes and in which free collective bargaining was intended to assure that the results of the contest are left to the bargaining strategies and strengths of the parties. Since Congress has, in fact, done so, as is manifest from the authorities cited *supra*, a state is barred from *any* action which disturbs the federally created balance of power and rights. Otherwise, the general framework would forever be in jeopardy from state attack because Congress did not explicitly bar every action a state might take which could affect that framework. This view is endorsed by this Court's observations in *Local 20, Teamsters* v. *Morton*, 377 U.S. 252 at 258-260 (1964). *Morton* concerned activity that was neither expresssly protected nor specifically forbidden by the National Labor Relations Act. This Court stated:

> "it is still necessary to determine whether . . . 'Congress occupied this field and closed it to state regulation.' The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation . . .' For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' " (citations omitted).

As shown above, the payment of unemployment benefits to employees idled in a labor dispute is impermissible since it disturbs the balance of strength created by federal labor policy.

Moreover, in the related area of state welfare payments to strikers, this Court has recognized that the known availability of state subsidies intrudes upon the collective bargaining process.

> "*It cannot be doubted* that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract." *Supertire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974) (emphasis added)[10]

This Court, has again reviewed the underlying questions involved here. Last term the Court reminded Wisconsin that it may not aid or strengthen the employer's hand in dealing with his employees during a collective bargaining dispute. In *Lodge 76, Int'l Ass'n. of Machinists* v. *Wisconsin Employment Relations Commission*, U.S. 96 S.Ct. 2548 (1976), an employer sought state aid to end a concerted refusal by his employees to work overtime during collective bargaining negotiations. Mr. Justice Brennan, speaking for the Court, stated (96 S.Ct. at 2557):

> "The employer in this case invoked the Wisconsin law because [it was] unable to overcome the union tactic with its own economic self-help means (footnote omitted) . . . But the economic weakness of the affected party cannot justify state aid contrary to federal law for "as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the

[10] State subsidies for workers improperly impairs the bargaining relationship even after a contract is executed. "Collective bargaining is a continuous process." *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957). State support for employees encourages strikes and intensifies an employer's economic disadvantage if any labor dispute occurs during the day-to-day adjustments of the contract. Such a strike incentive further contravenes the national labor policy favoring arbitration as the preferred method of resolving labor disputes. *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 247-48 (1970); cf. *Buffalo Forge Co.* v. *Steelworkers*, U.S. , 92 LRRM 3032 (No. 75-339 July 6, 1976).

> [National Labor Relations] Act; it is part and parcel of the process of collective bargaining" (citing *Ins. Agents' Union* v. *NLRB*, 361 U.S. 477, 495 (1960)).

Just as Wisconsin may not, consistent with federal labor policy, directly aid an employer by curtailing peaceful concerted employee pressure designed "to induce (the employer) to come to terms desired by [the union], "*Ins. Agents' Union* v. *NLRB, supra*, 361 U.S. at 489, states cannot directly support employees idled due to a labor disputes by grants which mitigate the economic hardships which forge collective agreements.[11]

Earlier in *Nash* v. *Florida Ind. Co.*, 389 U.S. 235 (1967), this Court prevented the state from *denying* unemployment benefits to an individual who filed unfair labor practice charges with the Labor Board because this denial "frustrated the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." at 239.

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[11] This Court's summary dismissal of the appeal in *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* U.S. , 45 U.S.L.W. 3247 (No. 75-1452, October 4, 1976), "for want of a substantial federal question" does not compel conclusions contrary to those urged here. This Court has cautioned that the precendential weight to be accorded to summary dismissals depends upon what constitutional issues were "properly presented" to this Court and the "reach and content" of the dismissal of those issues. *Hicks* v. *Miranda*, 422 U.S. 332, 345 n. 14 (1975). These determinations in turn depend upon the *ratio decidendi* of the lower court's opinion. *Honeyman* v. *Hanan*, 300 U.S. 14, 18 (1937).

The lower court in *Kimbell* (and in *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission*, 88, NM 596, 544 P.2d 1161 (1975), relied upon by that court in its *Kimbell* opinion) rested its decision to grant unemployment benefits to strikers solely upon non-federal statutory interpretation grounds. Consequently, the lower court in *Kimbell* did not consider the questions presented here, including those involving federal labor policy and state neutrality in labor disputes.

Moreover, state courts which *have* considered the issues here have reached conclusions consistant with those urged here. In *John Hancock Mutual Life Ins. Co.* v. *Commissioner of Ins.*, 349 Mass. 390, 208 N.E.2d 516 (1965), the Supreme Judicial Court of Massachusetts voided state legislation permitting policyholders an additional grace period if the company's collecting agents went on strike (208 N.E.2d at 524-25):

> " . . . the legislation under consideration . . . gives the union a potent weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining, left free by Congress for the operation of economic forces. For the state to intrude into such an area designed to be kept free is as much a violation of federal policy as it is for a state to attempt to regulate rights or duties specifically protected by the federal acts."

Second, when the Social Security Act was enacted in 1935, Congress was not legislating against a background where employees idled because of a labor dispute involving their employer were receiving state unemployment benefits.[12] Accordingly, there was no apparent reason to mandate the curtailment of such payments. *Third*, the National Labor Relations Act was enacted one month prior to the Social Security Act.[13] It is reasonable then to consider the Social Security Act in light of the policy of state neutrality manifested in the Labor Act. Indeed, the Social Security Act itself reflects concern with state neutrality in labor disputes. Thus, Congress in that Act provided against the possibility that unemployment compensation would become a financial incentive for the

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[12] Prior to 1935 only Wisconsin had legislated an unemployment benefit program. However, the implementation of this program was delayed and ultimately abandoned pending consideration by Congress of the federal system of unemployment compensation. R. Hoar, *Wisconsin Unemployment Insurance*, 1934.

[13] The Wagner Act became law on July 5, 1935; the Social Security Act became law on August 14, 1935.

unemployed to become strike breakers, by forbidding benefits to be withheld where claimants refuse employment which required them to become replacements for striking employees or to work at substandard conditions or to refrain from joining a *bona fide* labor organization. 29 U.S.C. 3304(a)(5).[14] Since Congress implemented its determination that states remain neutral in labor disputes by forestalling the use of the Social Security Act to weaken the bargaining position of unions, it is reasonable to conclude that it would have also rejected any attempt to use unemployment benefits to disadvantage employers as well. As shown above, payment of these benefits to persons idled due to a labor dispute would weaken an employer's bargaining position; accordingly, the denial of such payments is consistent with the federal social security scheme. *Fourth*, in *Burns* v. *Alcala*, 95 S.Ct. 1180, the Court held that the failure of Congress to expressly exclude—by legislative amendment to the Social Security Act—unborn children from AFDC benefits did not indicate approval of their eligibility. In view of Congress' overriding concern for state neutrality in labor disputes, and the fact that provision of unemployment compensation for those idled because of a labor dispute would disadvantage an employer, the failure of Congress to expressly disqualify these persons from receiving compensation cannot be taken to show Congressional approval that they should qualify as recipients.

The upshot is that the labor dispute disqualification in this case is permitted—indeed required—by the Social Security Act since it furthers the fundamental Congressional purpose of state neutrality in labor disputes.

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[14] Without this provision, the Social Security Act could have become a tool to weaken unions at the bargaining table.

CONCLUSION

For the foregoing reasons, the *amicus* urges that this Court reverse the decision below.

Respectfully submitted,

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